United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF

ORIGINAL WITH PROOF OF SERVICE

76-1284

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellant,

-v-

SYLVIO J. GRASSO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL BRIEF FOR APPELLEE

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

IGDALIA RIVERA, being duly sworn deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 264 Ave O BROOKLYN, N.Y. 11230

That on the 2 day of AUGUST, 1978, deponent personally served the within SUPPLEMENTAL BRIEF FOR APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving [illegible] true copies of same with a duly authorized person at their designated office.~~

By depositing (2) ~~true copies of same enclosed~~ in a postpaid ~~properly addressed~~ wrapper, in the post office or official depository ~~under the exclusive care and custody of the United States post office department within the State of New York.~~

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Qualified in Queens County
Commission Expires March 30, 1979

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Preliminary Statement

This brief is submitted pursuant to the Order of this Court dated July 18, 1978, and addresses the issues raised in the Order of the United States Supreme Court dated June 26, 1978, remanding the case for further consideration in light of United States v. Scott, ___ U.S. ___, 57 L.Ed.2d 65 (1978) and Arizona v. Washington, ___ U.S. ___, 54 L.Ed.2d 717 (1978). The statement of facts and argument contained in the original Brief for Appellee are respectfully incorporated herein.

ARGUMENT

POINT I

THIS CASE FALLS OUTSIDE THE SCOPE OF UNITED STATES V. SCOTT

United States v. Scott, ___ U.S. ___, 57 L.Ed.2d 65 (1978), involved a narcotics prosecution in which the defendant moved to dismiss two counts of the indictment, prior to and twice during his trial, on the ground of pre-indictment delay. At the close of all the evidence the trial court granted the motion. The government sought to appeal but the Sixth Circuit, relying on United States v. Jenkins, 420 U.S. 358 (1975), held that further prosecution of the defendant was

barred under the double jeopardy clause and therefore dismissed the appeal. The Supreme Court, overruling United States v. Jenkins, supra, reversed, and held:

> [W]here the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred by 18 U.S.C. § 3731.

57 L.Ed.2d at 80. Neither this rule, nor its underlying rationale, are applicable to the present case.

Prior to announcing this new rule regarding mid-trial dismissals obtained by the defendant, the Court reviewed established principles of double jeopardy relating to mistrials:

> When a trial court declares a mistrial, it all but invariably contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant's plea of double jeopardy. See Lee v United States, 432 US 23, 30, 53 L Ed 2d 80, 97 S Ct 2141 (1977). Such a motion may be granted upon the initiative of either party or upon the court's own initiative. The fact that the trial judge contemplates that there will be a new trial is not conclusive on the issue of double jeopardy; in passing on the propriety of a declaration of mistrial granted at the behest of the prosecutor or on the court's own motion, this Court has balanced "the valued right of a defendant to have his trial completed by the particular tribunal summoned

> to sit in judgment on him," Downum v United States, 372 US 734, 736, 10 L Ed 2d 100, 83 S Ct 1033 (1963), against the public interest in insuring that justice is meted out to offenders.

57 L.Ed.2d at 75.

The Court reiterated the "manifest necessity" test applied to mistrials granted on the trial court's own motion or motion of the prosecution, and noted that "the trial court's discretion must be exercised with careful regard for the interests first described in United States v. Perez [9 Wheat. 579 (1824)]." 57 L.Ed.2d at 75. Where the defendant himself seeks the mistrial, a different standard applies:

> Where, on the other hand, a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution. "A motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error.". . .

Id. at 75-76. The Court emphasized that:

> "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error."

57 L.Ed.2d at 76 [Quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)].

The net effect of the Supreme Court's holding in Scott is to equate a defense-requested mid-trial termination of the proceedings on a ground unrelated to factual guilt or innocence with a defense-requested mistrial. In both instances, the defendant controls his own fate, and voluntarily chooses to forego the empaneled jury in exchange for a ruling which he deems favorable:

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. We do not thereby adopt the doctrine of "waiver" of double jeopardy rejected in Green, supra. Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

57 L.Ed.2d at 79 (footnote omitted).

Sure enough, in the present case the defendant filed a mid-trial motion to dismiss the indictment on a ground unrelated to factual guilt or innocence, to wit, government

misconduct. If that motion had been granted, then, under Scott, the government would be allowed to appeal from the dismissal, and, if successful on the appeal, to retry the defendant. But defendant Grasso's motion to dismiss was denied, and the grounds urged in support thereof rejected by the trial court. Thus his effort at terminating his trial in a manner which he deemed favorable was unsuccessful. Accordingly, the holding of Scott, which concerns successful defense dismissal motions, is not applicable here.

After the defense motion was denied, the trial court sua sponte declared a mistrial. This termination of the trial was not requested by the defendant, nor was it based upon government misconduct, the only ground urged by the defendant in support of his dismissal motion. Since the defendant did not choose to have his trial terminated in this manner (for whatever reasons the trial court took this action) he clearly did not exercise the type of control over his own fate upon which the rule of Scott is based. Thus, unless the court was correct in declaring the mistrial sua sponte, the double jeopardy clause prohibits retrial here.

POINT II

THE SUA SPONTE MISTRIAL RULING WAS NOT THE PRODUCT OF "SOUND DISCRETION"

In Arizona v. Washington, ___ U.S. ___, 54 L.Ed.2d 717 (1978), the Supreme Court re-examined the standard for appellate review of mistrial rulings made without the defendant's consent. Initially, the Court noted that the constitutional protection against double jeopardy "embraces the defendant's 'valued right to have his trial completed by a particular tribunal'" and noted reasons why this "valued right" merits constitutional protection:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

54 L.Ed.2d at 727-728 (footnotes omitted).

The Court reiterated the "manifest necessity" test first announced in United States v. Perez, 9 Wheat. 579 (1824),

adding the following:

> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. For that reason Mr. Justice Story's classic formulation of the test has been quoted over and over again to provide guidance in the decision of a wide variety of cases. Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.

54 L.Ed.2d at 728-729 (footnotes omitted).

The trial problems which may warrant a mistrial vary in amenability to appellate scrutiny and, correspondingly, in the degree of deference to be shown the trial judge's action. Mistrial rulings based upon a deadlocked jury, or prejudicial remarks made before the jury, are entitled to the greatest deference. At the other end of the spectrum are mistrial rulings based upon defects in the government's proof, which warrant strictest appellate scrutiny. 54 L.Ed.2d at 729-731. Moreover, "if the trial judge acts for reasons completely unrelated to the trial problem which

purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate." Id. at 731 n.28.

Regardless of the nature of the trial problem, since a constitutionally protected interest is inevitably affected by any mistrial ruling, the trial judge

> "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be fairly disposed to his fate." United States v Jorn, 400 US, at 486, 27 L Ed 2d 543, 91 S Ct 547 (Harlan, J.). In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised "sound discretion" in declaring a mistrial.

54 L.Ed.2d at 733.

For several reasons, it cannot be said that "sound discretion" was exercised in this case when the trial court declared a mistrial on its own motion without any prior notice or discussion with counsel, at a point when but one government rebuttal witness remained to be heard in a complex tax evasion trial which encompassed eight trial days, over 50 witnesses and over 300 exhibits.

First, a rational justification for the mistrial is not at all apparent in the record. The trial judge stated on the one hand that there was "a manifest necessity for declaring a mistrial. Otherwise the ends of justice, public justice, would be defeated." (A-33). Yet, paradoxically, the court also indicated that a mistrial was necessary to prevent "an injustice to Mr. Grasso." (Id.). But the normally conflicting interests of the public "in fair trials designed to end in just judgments" and of the defendant in having his trial concluded by the first jury empaneled (see, e.g., Arizona v. Washington, supra, at 735) had not somehow merged in this case; the mistrial was not in fact necessary to protect either interest.

The only explanation for the mistrial appearing in the record is that the trial judge felt that government witness Daniel Harris had falsely testified about narcotics transactions with the defendant, and had thereby tainted the proceedings. Obviously, the defense agreed that Harris' testimony was perjurious, and this was of course the defense position even before Harris' recantation to Attorney Rothblatt. However, the government consistently maintained that Harris' trial testimony was truthful, and that the recantation was "an entire lie." (A-27). Thus, in the final analysis, there was

nothing extraordinary involved here. The recantation by Harris merely provided the defense with an additional inconsistent statement which could be used for impeachment. Nothing improper had transpired in the presence of the jury, and there was no reason to abort the trial. Indeed, the same circumstances would have been presented at a retrial if the government chose to have Harris testify, which it had a right to do. The mistrial accomplished nothing.

Second, the trial judge acted precipitately in declaring the mistrial. The Supreme Court made clear in Arizona v. Washington, supra, that this is an important consideration in assessing the trial court's exercise of discretion:

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. . . .

54 L.Ed.2d at 734.

Here, in contrast, neither party had requested or even suggested a mistrial at the time the trial judge aborted the trial. The declaration of a mistrial was completely

unexpected. It was never discussed with either defense counsel or the prosecutor, and neither side had any meaningful opportunity to consider, much less explain, its position in respect thereto.[1/]

1/ It is in this context that defense counsel's comment about agreeing with everything except the declaration of a mistrial must be viewed. It is clear that this remark had no bearing upon Judge Clarie's decision to declare a mistrial nor upon his recognition that he was taking this action without the defendant's consent. For he noted the potential double jeopardy problem created by his ruling in very similar language both before and after defense counsel's comment. (Compare A-35 with A-40). Placing substantial significance on this remark merely distorts the record.

It should also be emphasized that by his motion to dismiss the indictment on the ground of government misconduct the defendant sought a punitive dismissal of the proceeding based upon his contention that government agents had unlawfully coerced and suborned Daniel Harris. The defendant never argued or suggested that the trial could not continue if the court found against him on the issue of government misconduct. The question of how to proceed if the dismissal motion were denied had not yet been addressed.

Third, as both Judge Zampano and this Court have found, there were several obvious alternatives to a mistrial which, as far as the record indicates, the trial judge never considered. While the Supreme Court has indicated that the absence of explicit findings does not in itself render a mistrial ruling constitutionally defective, an adequate basis for the mistrial still must appear in the record. See Arizona v. Washington, supra, at 735. None can be found here.

Fourth, the fact that the trial was aborted at a very late stage--in the government's rebuttal case with but one witness remaining to be heard--is an additional factor to be considered in assessing the trial court's exercise of discretion.

And fifth, the Supreme Court has indicated that a showing by the defendant of specific prejudice from a mistrial ruling is a relevant consideration. Arizona v. Washington, supra, at 734 n.35 (citing McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973), which is discussed in Appellee's original brief at 15). In the present case Judge Zampano made such a finding, citing several factors, including: the tactical advantage the defendant would lose upon retrial; the opportunity the government would have to strengthen

its case; the economic strain upon the defendant and his financial inability to defend a second prosecution and retain counsel of his choice; and the infringement of the defendant's right to a speedy trial. 413 F.Supp. at 171-172.

In sum, it is clear that even when viewed in light of Arizona v. Washington, supra, the sua sponte mistrial declaration in this case was error, and reprosecution of the defendant would be violative of the Double Jeopardy Clause.

POINT III

THE DEFENDANT WAS NOT REQUIRED TO AFFIRMATIVELY OBJECT TO THE DECLARATION OF A MISTRIAL TO PRESERVE HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE

Under the circumstances of this case the defendant was not required to affirmatively "object" to the sua sponte mistrial declaration in order to preserve his rights under the Double Jeopardy Clause. The critical point, which is irrefutable in this record, is that the trial judge acted without the defendant's consent. See, e.g., United States v. Jorn, 400 U.S. 470, 484-485 (1971).

Most of the cases cited in the dissenting opinion for the proposition that affirmative conduct on the part of a defendant is required to preserve a double jeopardy claim (552 F.2d at 56) did not involve a true sua sponte mistrial situation. Either a motion for a mistrial had been filed by the defendant himself, United States v. Goldstein, 479 F.2d 1061 (2d Cir.), cert. denied, 414 U.S. 873 (1973); United States v. Pappas, 445 F.2d 1194 (3d Cir. 1971), or by a co-defendant, United States v. Gentile, 525 F.2d 252 (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976); Roberts v. United States, 477 F.2d 544 (8th Cir. 1973); Scott v. United States, 202 F.2d 354 (D.C. Cir.), cert. denied, 344 U.S. 879 (1952). The remaining cases involved a deadlocked-jury situation where it was held that the defendant failed to sufficiently advise the trial judge of his desire for the deliberations to continue. United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975); United States v. Phillips, 431 F.2d 949 (3d Cir. 1970); United States v. Gordy, 526 F.2d 631, 635 & n.1 (5th Cir. 1976) (dictum)

In all of these cases the circumstances were such that the trial judge had reason to believe the defendant

desired a mistrial. Without an affirmative statement advising the court that this was not the case, and that the defendant did not in fact desire a mistrial, consent could reasonably be implied.[2/]

In the present case, no party had requested a mistrial (it was never discussed at all) prior to the court's sua sponte declaration, and the circumstances did not otherwise obligate defendant Grasso to affirmatively note his non-acquiescence in the court's ruling. Moreover, at the time he declared the mistrial, the trial judge expressly stated that

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2/ United States v. Sedgwick, 345 A.2d 465 (D.C. Ct. App.), cert. denied, 423 U.S. 1028 (1975), is distinguishable for another important reason. In that case, prior to declaring a mistrial the court consulted with defense counsel and suggested an alternative means of dealing with the problem that had arisen during trial. The mistrial was declared only after this alternative was rejected by the defendant, who insisted upon a dismissal. 345 A.2d at 472. Such discussion of alternatives is precisely what was not done here.

the double jeopardy issue could be argued later if the government decided to reprosecute (A-35), clearly confirming that the judge believed he was acting without the defendant's consent. To require a more explicit objection under these circumstances (even assuming there were such a requirement) would be to exalt form over substance.[3/] For it was already clear that the trial judge understood the defendant's position. Furthermore, it would not even have been appropriate for counsel to discuss double jeopardy considerations at that time in light of the judge's specific statement that such discussion was to be deferred.

3/ Defense counsel clearly made the trial judge aware of the relief he sought and the grounds therefor, which is all that is generally required. See Fed.R.Crim.P. 51. Moreover:

> The general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion. If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance.

3 Wright, Federal Practice and Procedure § 842, at 345.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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